

USDOL/OALJ Reporter

[\*Lassin v. Michigan State University\*, 93-ERA-31 \(Sec'y June 29, 1995\)](#)

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DATE: June 29, 1995  
CASE NO. 93-ERA-31

IN THE MATTER OF

RICHARD LASSIN,

COMPLAINANT,

v.

MICHIGAN STATE UNIVERSITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Complainant Richard Lassin alleges that Respondent Michigan State University ("Michigan State" or "the University") violated the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 52 U.S.C. § 5851 (1988 and Supp. IV 1992), when it reassigned, suspended, and discharged him. The Administrative Law Judge (ALJ) found that Lassin did not establish that his report of radioactive contamination to the Nuclear Regulatory Commission (NRC) was a contributing factor in Michigan State's actions toward him. The ALJ further found that the University established by clear and convincing evidence that it would have taken the same actions even if Lassin had not reported the contamination to the NRC. I agree with and adopt the ALJ's findings and conclusions, as modified below, and dismiss the complaint.

BACKGROUND

Lassin worked as a health physicist for Michigan State's Office of Radiation, Chemical and Biological Safety (ORCBS), T. 24, and was the only ORCBS staff member assigned to the University's National Superconducting Cyclotron Laboratory

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(Cyclotron). T. 27. In March 1993, Lassin discovered radioactive contamination at the Cyclotron and informed his superiors. T. 47-48. Lassin also telephoned a friend who worked at the NRC to discuss the contamination because he believed it was a "reportable incident" under the NRC's regulations. T. 51-

52. The friend notified his superiors at the NRC, who in turn telephoned ORCBS to obtain more information concerning the radioactive spill. T. 54-55.

The NRC promptly conducted an on-site inspection of the University's handling of radioactive materials. T. 308. The resulting NRC inspection report identified nine apparent violations at the University, including failure to follow Department of Transportation (DOT) regulations while transporting certain equipment. CX 15 p. 2. The NRC also expressed concern that "there has been a lack of managerial authority exercised by [ORCBS] with regard to health and safety related activities at the [Cyclotron]." CX 15 p. 3.

The University believed that the NRC's report jeopardized its nuclear license and consequently planned a major effort to ensure compliance in the handling of radioactive materials. T. 257-258, 262-263. Among other things, Michigan State performed a thorough survey of the laboratories that used radioactive isotopes. T. 257-258. The survey required the commitment of many employees' time and consequently the work assignments of all ORCBS radiation safety staff were modified. T. 313-316, 466-467.

As part of its efforts to remedy the NRC's concerns, the University decided that the Cyclotron's safety coverage would be provided by various ORCBS staff, rather than solely by one staff member, Lassin. CX 16. Lassin was needed to assist in the University-wide effort to remedy problems in handling radioactive materials. T. 317-319, 468. Consequently, Lassin's immediate supervisor, Kristin Erickson, informed him that as of April 12, 1993, he was to report to the ORCBS office each morning, rather than the Cyclotron, "until further notice." CX 16 p. 2.

When Lassin reported to ORCBS, Erickson assigned him to work on surveying and correcting one of the cited deficiencies in a field in which he had experience, compliance with DOT regulations for transporting nuclear materials. T. 94, 318-319. Erickson told Lassin to work in the conference room temporarily until she had time to find him an office at ORCBS. T. 371. Lassin informed Erickson and ORCBS manager John Parmer that he disagreed with the reassignment of his duties and was filing a grievance. T. 449.

Lassin went to his old office at the Cyclotron to telephone a union representative for advice. T. 99. When Lassin did not respond to telephone messages and pages, Erickson and Parmer

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visited the Cyclotron to speak with him. T. 452. Parmer asked why Lassin had not returned to his assigned work at the ORCBS office. T. 452. Lassin responded that he had been advised not to talk to them, but did not mention that a union representative gave him the advice. *Id.*

Parmer told Lassin to bring a union representative to a meeting later that day and left. T. 453. On advice from the Employee Relations Department, Parmer promptly returned to the Cyclotron and gave Lassin a direct order to report to the ORCBS office. T. 454. Again, Lassin responded that he had been advised not to talk to Parmer. *Id.* Parmer told Lassin that refusing to respond would be interpreted as refusing the order and Lassin still did not respond. T. 454. Parmer again

told Lassin to get a union representative. T. 455. After Lassin said that no representative would be available until two days later, *id.*, Parmer suspended Lassin without pay "until further notice." T. 456.

Later that day, Parmer attempted to inform Lassin that he could report to work when he was ready to comply with his job assignment. T. 457. When Lassin heard Parmer's voice, he hung up the telephone. *Id.* Union representative Kay Butcher gave Lassin the message and advised him to return to work. T. 458.

A few days later, Lassin again hung up the telephone when Parmer called to convey information. T. 459. Consequently, Butcher informed Lassin about a meeting on April 15 to discuss the suspension and advised him to attend. T. 230-231. Butcher was aware that Lassin's failure to attend could result in his discharge. T. 231.

Although a union representative attended the April 15 meeting, Lassin did not, citing "personal reasons." T. 460. Parmer sent Lassin a letter discharging him for failure to comply with orders and to report to his job assignment. CX 21, 22. The letter advised that the discharge would be final if Lassin did not provide a valid reason for his absence from the April 15 meeting. *Id.* The union responded that Lassin did not attend because of Parmer's angry and uncontrollable behavior. CX 16. The University considered Lassin's explanation not to be a valid excuse. T. 461.

#### MOTIONS TO REOPEN THE RECORD

Lassin has filed two motions to reopen the record to admit newly discovered evidence. Since the close of the record in this case, an arbitration hearing has been held concerning the grievances filed by Lassin. No transcript was made of the arbitration hearing. Lassin seeks to reopen the record to receive his and his attorney's affidavits attesting to testimony given by Erickson and Parmer at the arbitration hearing.

Under the governing regulation, once the record is closed,

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"no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). Testimony at a subsequent hearing obviously was not available prior to the close of the record in this case. Since "strong federal policies" favor arbitration agreements arrived at through collective bargaining procedures, the Secretary generally considers arbitral proceedings and decisions in cases concerning discrimination under an employee protection provision. See *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 (11th Cir. 1987) (finding that Secretary should consider arbitration decision in whistleblower complaint under Surface Transportation Assistance Act). The Secretary has discretion to determine the weight to be accorded an arbitral decision with regard to the facts and circumstances of each case. *Roadway*, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974).

In this case, Lassin seeks not to introduce an arbitral decision or even a transcript of an arbitration hearing, but rather asks the admission into the record of his own recounting

of some of the testimony of opposing witnesses at an arbitration hearing. The University strongly disagrees with Lassin's version of the testimony. See Respondent's Responses to both of Complainant's Motions to Reopen Record. In view of my discretion to accord arbitral proceedings whatever weight they are due, and my belief that one party's account of testimony is inherently unreliable, I decline to admit Lassin's version of the testimony. Lassin's motions to reopen the record are DENIED.

#### DISCUSSION

In a case such as this in which Michigan State introduced evidence to rebut a *prima facie* case of a violation of the employee protection provision, it is unnecessary to engage in a lengthy analysis of the elements of a *prima facie* case. See *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n. 9, *petition for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995). The question to be resolved is whether Lassin established by a preponderance of the evidence that his report to the NRC was a contributing factor in the University's adverse actions against him. 42 U.S.C.A. § 5851(b)(3)(C) (West 1994).

After a thorough review of the record, I agree with the ALJ's reasoning and conclusion that Lassin did not establish by a preponderance of the evidence that his protected activities were a contributing factor in the University's decisions to reassign, suspend, and discharge him. R. D. and O. at 6-9. I also agree that even if his protected activities were a contributing factor,

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Michigan State demonstrated by clear and convincing evidence that it would have taken the same actions against Lassin, even if he had not informed the NRC about the contamination. *Id.* at 9;

42 U.S.C.A. § 5851(b)(3)(D).

Lassin argues that the memorandum requiring him to report each morning to the ORCBS office shows that his reassignment was a pretext for discrimination. He faults the need for a written memorandum because the University could have invited him to the March 19 staff meeting at which all the other ORCBS employees learned that their job duties would be altered. Complainant's Exceptions (Com. Exc.) at 18-19.

At the time, Lassin worked only at the Cyclotron, did not have an office at ORCBS, and normally did not attend meetings of the ORCBS staff. T. 309. Erickson testified convincingly that the March 19 meeting called by Parmer was "impromptu with just whatever radiation safety staff were present" at the ORCBS office. T. 312. Although Lassin had been present at the ORCBS office prior to the impromptu meeting, I do not find it unusual that Erickson and Parmer did not think to invite him. Erickson explained, "if [Lassin] had been working in our office, he would have been in on those meetings and a part of [the verbal reassignments]." T. 370.

The University reassigned Lassin's duties in an effort to attain compliance with the NRC's regulations and preserve its license to handle nuclear materials. Lassin contends that one of the initial assignments given to him upon reporting to the ORCBS

office does not make sense because the NRC did not cite "bioassay reports and spreadsheets" as an area of concern or violation. Com. Exc. 19. Erickson testified that she assigned Lassin to work on the bioassay reports to address "one of [the NRC's] verbal concerns that they communicated during the broad license inspection." T. 318. In any event, Lassin's initial assignment was to work on complying with DOT regulations for transporting radioactive materials, which was the subject of three of the apparent violations the NRC found in its inspection report. T. 319; CX 15 p. 2 at ¶ 6, 7, and 8.

Lassin asserts pretext because the University found no suitable office space for him in the nine days between issuing the reassignment memorandum (April 3) and the date he reported to the ORCBS office (April 12). Erickson testified that she had been out of town for four days and that she placed Lassin temporarily in the conference room, which she acknowledged to be inadequate as office space. T. 320, 325, 372. Moreover, no one told Lassin to move out of his Cyclotron office, which he could keep. T. 319-320. Further, Lassin did not know that working in the conference room was to be temporary because he cut off communication and refused to discuss the issue. T. 320, 325-326.

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Lassin contests the propriety of his suspension because the University did not afford him a hearing at which a union representative was present. Comp. Exc. at 15-16. When Parmer determined that he might take disciplinary action, he directed Lassin to have a union representative present at a one o'clock meeting on April 12. After telephoning a union representative, Lassin informed Parmer that no union representative would be available until two days later, on April 14. T. 105, 455. I do not find fault with Parmer's decision to suspend Lassin immediately rather than wait two days purportedly to accommodate the availability of a union representative. Moreover, Lassin's credibility on this issue is slight because the union representative testified that she told Lassin that she would be available after 2 p.m. on April 12 and all day on April 13. T. 223, 227. Lassin did not convey that information to Parmer.[1]

Lassin contends that discharging him for not appearing at a meeting on April 15 was unfair since he had prior approval to take off that day. Comp. Exc. at 18. However, Parmer had canceled Lassin's scheduled time off during the suspension. T. 458. Moreover, union representative Butcher testified that she informed Lassin about the meeting and advised him to attend. T. 230-231.

The University afforded Lassin the opportunity to explain in writing the basis for not attending the April 15 meeting. CX 21, 22. No other witnesses corroborated Lassin's excuse for not attending, that he had been "subjected to unwarranted verbal abuse" by Parmer and did not wish to be subjected to it again. See CX 23. Whereas Lassin testified that Parmer's voice was strained and tense in earlier conversations, he admitted on cross examination that Parmer never swore, used abusive words, or demeaned him in person. T. 191-192. I agree with the University that Lassin's excuse for not attending the meeting was not valid.

Finally, Lassin faults the ALJ for crediting the testimony of Michigan State's witnesses rather than his testimony when there were conflicting versions of events. Comp. Exc. at 6-15; see R. D. and O. at 9. Since the ALJ observed the witnesses' demeanor, his determinations of credibility are given special weight. *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991). My review of the record substantiates the validity of the ALJ's credibility assessments.

CONCLUSION

Lassin did not persuade me that his protected activities were a contributing factor in the University's adverse personnel actions. Assuming that his protected activities were a contributing factor, I find that the University demonstrated by clear and convincing evidence that it would have taken the same

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actions against Lassin in the absence of his protected activities. Accordingly, the complaint is DISMISSED.

SO ORDERED.

ROBERT B. REICH  
Secretary of Labor

Washington, D.C.

[ENDNOTES]

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Lassin contends that "[a]t any time, the Respondent could have postponed the discipline and waited an hour or two as originally planned so that both parties could be prepared and hopefully, represented properly." Comp. Exc. at 16. I find this argument disingenuous, since Lassin admitted that he told Parmer that the union representative would not be available until two days later. T. 105.